FILED

JUL 16 2001

INDIANA UTILITY REGULATORY COMMISSION

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

In the Matter of the Petition of	)	
Indiana Bell Telephone Company,	)	
Incorporated d/b/a Ameritech Indiana	)	
Pursuant to I.C. 8-1-2-61 For a Three	)	**Cause No. 41657**
Phase Process For Commission	)	
Review of Various Submissions of	)	
Ameritech Indiana to Show Compliance	)	
with Section 271(c) of The Telecommunications	)	
Act of 1996	)	

AMERITECH INDIANA'S RESPONSE TO TIME WARNER'S MOTION FOR RESOLUTION OF DISPUTED SPECIAL ACCESS ISSUE

1. On July 6, 2001, Time Warner Telecom of Indiana, L.P. ("Time Warner") filed a Motion For Resolution requesting the Commission to resolve the pending Special Access issue in this proceeding. As Time Warner notes in its Motion, its February 21, 2001, statement of dispute contends that Special Access services, such as DS1 and DS3 purchased out of Ameritech Indiana's intrastate and its interstate FCC No. 2 Tariff, should be included within the scope of this Section 271 proceeding. Because testing is underway Time Warner suggests that it is timely for the Commission to resolve this disputed issue.

2. On February 27, 2001,in response to this claim, Ameritech requested that Time Warner's request be denied because it is in conflict with controlling precedent and inconsistent with the purpose of this proceeding—to review Ameritech Indiana's compliance with Section 271(c) of the Telecommunications Act of 1996. Claims or concerns regarding Special Access services are outside the scope of a Section 271 review.

CLEC efforts to introduce identical Special Access tariff issues into 271 proceedings have been routinely rejected by the Federal Communications Commission ("FCC").

3. Ameritech has no objection to Time Warner's Motion that the Commission addresses this matter promptly, subject to the following exception. Time Warner argues that "This matter has been fully briefed, and no additional briefing is necessary." (Motion at par. 7) That was true until Time Warner's recent Motion. However, in addition to requesting that the Commission decide this matter, Time Warner has raised new arguments and purported legal authority. Ameritech has not had the opportunity to respond to these new claims. Therefore, to the extent the Commission wishes to considers these new materials a short round of additional briefing will be required because Time Warner has failed to fully explain these materials.

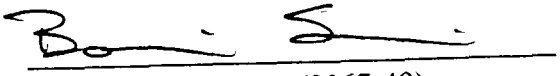
4. For example, Time Warner states that the Texas Public Utilities Commission "agreed with TWTC's request." However, the proceeding Time Warner relies upon is still before the Texas Commission on Rehearing. For the sake of completeness, Ameritech is attaching Southwestern Bell's Request for Rehearing and Clarification, dated July 2, 2001 and its Reply, dated July 13, 2001. In short, that proceeding is not final at this point.

5. Likewise, Time Warner relies on an Order from the New York Public Service Commission. The New York proceeding is not a Section 271 proceeding. Nor did the New York Commission require Verizon to include interstate special access in either performance measure or a remedy plan. In a letter to the Federal Communications Commission dated May 22, 2001, the New York Commission acknowledges that it has no authority over interstate special access and is requesting that the FCC delegate its

authority over interstate special access for the purpose of implementing performance measures. A copy of the New York Commission's letter is attached.

WHEREFORE, Ameritech requests the opportunity to fully respond to the new "authority" included in Time Warner's Motion, if the Commission intends to take notice of these decisions. In the alternative, Ameritech Indiana has no objection to the Commission promptly issuing an order based on the record as it existed before Time Warner's Motion, if the Commission decides to reject Time Warner's attempt to supplement the record.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 16, 2001, the foregoing was served electronically upon the Ameritech 271 distribution list at ameritech271@urc.state.in.us.

Bonnie K. Simmons

SWB
July 13, 2001

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PROJECT NO. 20400

SECTION 271 COMPLIANCE MONITORING OF SOUTHWESTERN BELL TELEPHONE COMPANY	**§ § § §**	**PUBLIC UTILITY COMMISSION OF TEXAS**

REPLY OF SOUTHWESTERN BELL TELEPHONE COMPANY

Southwestern Bell Telephone Company (SWBT) files this Reply to the Responses filed by WorldCom Inc. (WorldCom), IP Communications Corporation (IP), AT&T Communications of Texas, L.P. (AT&T), Time Warner Telecom of Texas, L.P. (Time Warner), and Birch Telecom of Texas, L.L.P. (Birch) to SWBT's Motion for Rehearing and Clarification filed July 2, 2001, relating to the collaborative Performance Measurements (PMs) Second Six Month Review process.

1. SWBT's Motion is Timely

SWBT's Filing on July 2, 2001 was intended to advise the Commission and the parties of its disagreement with certain aspects of Order No. 33. Absent consent by SWBT to implement all of the directives arising out of this PM collaborative proceeding, the Commission cannot require implementation without mutual agreement of the parties or, with respect to new measures, unless and until an arbitration on the record subject to appellate rights is conducted. In fact, at this juncture SWBT is asking the Commission to review its directive as to only three limited issues so as to avoid a full blown arbitrated proceeding on these matters. As such, neither a timeline under the Administrative Procedures Act (APA), as set out in Chapter 2001 of the Government Code, nor the Commission's arbitration rules apply at this juncture.

AT&T, Worldcom and Birch challenged the timeliness of SWBT's July 2, 2001 filing claiming it does not comport with the twenty day requirement for filing motions for

rehearing under the APA. Procedural Rule § 22.264 does not apply to this Project because Project No. 20400 is not a rulemaking,[1] nor a contested case proceeding,[2] and neither is it a procedure under the Commission's Dispute Resolution Rules, starting at § 22.301 et al. The Administrative Procedures Act (APA) is state law applicable to traditional tariff and rulemaking proceedings that would not be used to govern the Commission's collaborative actions under the FTA. SWBT does not agree with AT&T that the collaborative sessions which have occurred in this project are the "arbitration" which is referenced in Paragraph 6.4 of Attachment 17 of the T2A. The point remains that AT&T cannot have it both ways and claim that the procedures of APA control while also claiming that this project has been conducted as a federally delegated arbitration. AT&T concedes the point that this project is not governed by the APA by asserting that these sessions have been the arbitration[3] provided for under the T2A.

The styling of SWBT's pleading as a "motion for rehearing" had nothing to do with satisfying a procedural requisite but everything to do with seeking reconsideration of the Commission's ruling in Order No. 33 on the three points raised in the Motion (PM 1.2, PM 13, and Special Access), before SWBT or another CLEC exercises its option of pursuing arbitration as set forth in Paragraph 6.4 which provides:

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[1] Under PURA § 11.003(13) the term "order" means all or part of a final disposition by regulatory authority ***in a matter other than rulemaking***, without regard to whether the disposition is affirmative or negative or injunctive or declaratory. (Emphasis added.)

[2] APA § 2001.003 (1) defines a "contested case" as "a proceeding, including a ratemaking or licensing proceeding, in which the legal rights, duties, or privileges of a party are to be determined by a state agency ***after an opportunity for adjudicative hearing.***" (Emphasis added.)

[3] Nonetheless, Subchapters P and Q contain rules for "Dispute Resolution" and "Post-Interconnection Agreement Dispute Resolution", respectively, neither of which were followed within this collaborative proceeding.

> Any changes to existing performance measures and this remedy plan shall be by mutual agreement of the parties and, if necessary, with respect to new measures and their appropriate classification, by arbitration. The current measurements and benchmarks will be in effect until modified hereunder or expiration of the interconnection agreement. (Emphasis added.)[4]

The APA procedures do not apply to dockets and projects related to the T2A.[5] In fact, no procedural rules have been applied to the collaborative process, because it is a unique process established within the context of the § 271 proceeding to facilitate the "mutual agreement of the parties." It is not an arbitration, nor is it a contested case governed by the APA, but it is instead a project, just as it is entitled, better described as a collaborative process that was begun with the § 271 initiative. These Commission initiated projects relating to FTA matters have traditionally been informal proceedings that are not governed by strict rules as rulemakings, contested cases and arbitration cases are. Order No. 33 is obviously not a final order since compliance monitoring will continue throughout the life of the T2A. Arbitration is the vehicle contemplated by Attachment 17 to effect any new measures that could not mutually agreed upon during the collaborative. (*See,* Attachment 17 of the T2A ¶ 6.4.)

SWBT's instant motion is not even necessary, but prior to entering into further "collaborative processes" intending to establish special access PMs, to discuss the PM 13 audit, or to discuss further implementation of PM 1.2, SWBT wanted to make it clear to all parties and Staff that it would not be held to have "mutually agreed to such measurements."

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[4] This provision is applicable to all parties under the Performance Remedy Plan.

[5] In fact, AT&T and WorldCom attempt to confuse the issue of what procedures apply to this proceeding. Section 22.305(j) indicates that subchapters A through O of the procedural rules do not apply to proceedings brought under the arbitration rules. If this is an arbitration as they allege, then Section 22.264, which is part of subchapter N, would not apply.

2. Contrary to IP's assertions, implementation of PM 1.2 has changed in the Second Six Month Review.

PM 1.2 was added to the PMs during the First Six Month Review. SWBT began the implementation of PM 1.2 after conferences with Staff wherein SWBT's process for capturing data was approved. During the Second Six Month Review, that process was changed. SWBT opposes this change, not the addition of PM 1.2 as a measure.

SWBT proposed that for PM 1.2, the accuracy of the information given to the CLEC be measured if the CLEC actually provisioned service on the loop for which the loop qualification was requested. SWBT is able to capture and report the data in this fashion. Further, this does not produce the reporting of false data as IP suggests. The accuracy of the reporting of this data can be measured. SWBT is not able to capture and report the data as PM 1.2 has been altered.

The Commission is shifting to measuring the accuracy of the individual pieces of data in the database where it exists and this will not measure the accuracy of loop information used by SWBT and provided to the CLECs. For example, if a loop is reported as 11 kilofeet (kft), no load coils, 1 kft. bridge tap and the actual loop measures 6 kft, no load coils and 2 kft bridge tap, is that an inaccurate loop qualification? It is certainly an inaccurate piece of data in the database, but the loop qualification is accurate and would be reported that way. What the Commission ordered is not in concert with the original PM requirement. Sampling will not give the CLECs the accuracy of the response, only of the underlying data. To equate the two is faulty.

The Loop Qual System retrieves information, if it exists, from SWBT's Loop Facilities Assignment Control System (LFACS) database. Qualification accuracy depends on several factors; accurate input of a Street Address Guide (SAG) valid

address, interpretation of the resulting data that is returned, and the validity of the data that is returned in the query as it pertains to any plant facilities capable of serving that address. The purpose of Loop Qual is to give the CLEC customer access to information that would allow them to make a determination as to whether they can provide their service to their customer. In many cases, the individual fields of information from the LFACS database are not 100% accurate, but the Loop Qual is returned with the information that is available to SWBT itself. The data that is available is on loops that are currently assembled. These are either working circuits or assembled facilities that used to be working as voice circuits. But this is by no means all of the possible serving combinations available, LFACS has no means of retrieving all of the possible combinations of elements that could be assembled. Thus, the data that is provided in response to a Loop Qual request may be accurate even though the Loop Qual itself is not. Determining the accuracy of the individual field can only be accomplished with a combination of complicated tests, and review of the database and engineering records to access the individual components and their status.[6] Many issues remain which would be involved in determining how the accuracy could be designated, raising doubt about whether the data in LFACS can technically be made more accurate than currently exists. There are millions of pieces of information in the LFACS database and other than digging up every cable and pulling down every aerial, no method exists which would make the data relate to each individual CLECs' requirements and specificity.

[6] For example, is the data accurate if it shows 12,345 kft (kilo-feet or thousand feet) when the actual length is 12,346 feet? What about 12,500 feet? What about 13,000 feet? All of these would work for data services, but what if the loop measured 17,500 feet and was 18,000 feet and that made the service impossible to offer? Would the same concern exist if the length were actually 17,000 feet? Is accuracy related only to whether the actual is worse than the indicated?

The requirements of the UNE remand order clearly do not envision that means be undertaken to make the data more accurate than it currently is, nor to assign benchmark levels of accuracy to be provided. Additionally, the Commission offers no means for cost recovery for field inspections to insure the accuracy of the information. The amount of effort that it would take to assess this new measurement of PM 1.2 on a monthly basis is onerous, at best, and it still does not accomplish the goals of the Commission.

3. PM 13 penalties were retroactively changed in the Second Six Month Review unnecessarily and unfairly.

As stated in its Motion, SWBT has agreed to an audit of PM 13 data and to the restatement of that data. SWBT does not agree to the change in the penalty level from the Low Level to the High Level on a retroactive basis. No evidence was introduced at the collaborative sessions that SWBT made any false or misleading representations about how it was capturing and reporting the data on PM 13. SWBT has made no misrepresentations as AT&T and Birch would have the Commission believe.

The question is what type of orders will be counted in the denominator of PM 13. The Commission has ordered that "SWBT must make clear that it will include in the denominator CLEC order types that would flow through EASE for SWBT retail operations, regardless of whether they are MOG eligible." The simple matter is that UNE-P orders cannot be entered into the EASE system under any circumstance. UNE-P orders can only be entered into SORD or received via LEX/EDI and flowed through MOG if designed to do so. Resale orders can also be received in LASR and flowed through MOG if the CLEC chooses to submit the orders via LEX/EDI, but not all Resale

orders are designed to flow through MOG if they are submitted via LEX/EDI. Resale is the only product type that flows through EASE.

No one has misrepresented any information. SWBT has and will include all LEX/EDI resale orders that would have flowed through EASE regardless of their MOG eligibility. SWBT will also include within the denominator all UNE-P orders (analogous to POTS-like retail service) that would flow through EASE for SWBT retail operations regardless of their MOG eligibility for flow through. SWBT's plan is to classify the orders that are not MOG eligible as MOG eligible in LASR. This is the basis for the method in which SWBT is measuring the denominator.

As stated above, SWBT is only opposed to the retroactive application of the change in the penalty level from Low to High. SWBT has offered the above explanation to support why a punitive change in the penalty level is not appropriate. SWBT does agree to audit and restate the PM 13 data.

4. Special Access Services Should Not Be Measured within the Context of the 271 Performance Remedy Plan

In its Motion, SWBT opposed PM's being implemented in the review process to measure SWBT's performance under the interstate and intrastate tariffs for the provisioning of Special Access. Special Access is a tariffed service; it is not part of the T2A or any interconnection agreement, and thus cannot legally be subject to the Performance Remedy Plan. Access is an end to end service as opposed to UNE's, which are network elements or functionalities under the FTA definition of network elements that CLECs can use to create telecom services. Access services should not be measured within the context of § 271 Compliance Monitoring. Notwithstanding SWBT's arguments, WorldCom and Time Warner wrongfully persist in encouraging the

Commission to exercise authority over predominately interstate matters, and they misinterpret the record of this proceeding.

- ***WorldCom claims the Commission's order reflects the will of the Staff and the Commission after a detailed review of the issue.***

SWBT noted that the record showed a significant amount of uncertainty and noted the Commission's lack of clarity on the issue. This is demonstrated by the fact that the Commission instructed staff to continue with a follow-up workshop on this issue. WorldCom claims the Order "speaks for itself," but does not show how the Order is as clear as the CLECs claim.

- ***WorldCom claims that SWBT's suggestion that it has veto power over a Commission order denigrates the Commission's authority and is inconsistent with the language of the Texas 271 Agreement (T2A).***

WorldCom cites to the T2A to assert that this is the type of arbitration that may institute new PMs. As stated above, there is no authority for the proposition that the collaborative process is an arbitration case. No arbitration rules were followed. The purpose of the proceeding was to get agreement, which it largely accomplished. Further, WorldCom completely ignores the first portion of the language it quotes from SWBT's Motion. The T2A clearly states that changes shall be by agreement. Only when agreement is not reached as to new measures may the issue be brought to arbitration. Agreement was not reached during the parties' negotiations and SWBT does not agree to the addition of these Special Access performance measures. Thus, the issue of the new measures for access services cannot be resolved until there is arbitration.

Negotiations are a legal prerequisite to the altering of a contract between parties. PM remedy plans are a form of liquidated damage remedy to which both parties to a

contract must voluntarily agree in order for it to be lawful and binding. Any attempt to impose it on the parties would constitute a violation of the constitutional right to due process, (i.e., a trial after the fact of any alleged misunderstanding or breach at which time the parties would have a proper hearing to introduce proper evidence and assess the actual damages, if any, caused by the alleged breach).

- ***WorldCom claims that during this proceeding, CLECs outlined numerous occasions where SWBT's unduly restrictive interpretations of the FTA forced CLECs to order services out of SWBT's special access tariffs.***

WorldCom and Time Warner persist in their claim that CLECs are "forced" to order services from SWBT's special access tariffs. Neither party has yet to provide any specific instance of when it has been so "forced." Certainly, there are occasions where CLECs (as WorldCom admits) find it "easier" to use the access products of SWBT rather than investing in their own facilities (and providing a concurrent boost to the state's economy), but that should be the choice of the CLEC for their own internal business purposes, as it is. There is no need in this proceeding to skew that choice by altering the terms and conditions of SWBT's access products. The better course would be to allow the incentives of the marketplace to continue to create other choices for CLECs.

As SWBT stated, competition in the special access arena is alive and well. There is no need to establish PMs for such mature services, particularly not the kind of PMs, which have been developed for the NEW product offerings designed for the wholesale local business. The recent award by the FCC of significant pricing flexibility for SWBT's special access services in many Texas MSAs underscores the high level of competition that currently exists, and which should be allowed to further develop.

SWBT is simply not the sole provider of access services as is evidenced by the granting of pricing flexibility in most metropolitan areas.

SWBT should be encouraged to tell a customer that there are other products it offers when the product they want is not available (either because of no facilities in the case of dark fiber or because the product does not meet the FCC significant local requirements for EELs). This is not "forcing" a CLEC into using access. Access might be used by a CLEC to transport the same traffic that it could use UNEs to carry, but the services are not the same. Access can be combined, different billing formats are available, and it is an end to end service. UNE's are network elements that the CLECs combine to create telecom services. Just because a CLEC may use access services and UNEs for the same purposes does not make them the same service. The Commission should not now penalize SWBT because its account managers were proactive, customer-oriented problem solvers.

- ***WorldCom claims the Commission has jurisdiction under state law and concurrent jurisdiction with the Federal Communications Commission (FCC) under federal law to oversee SWBT's access performance.***

WorldCom cites to a New York Commission order as evidence of how another state has chosen to monitor the access services of an ILEC. That proceeding is not as instructive as WorldCom would like this Commission to believe. A brief review of it shows that it was the culmination of a lengthy investigation into Verizon's access services performance deficiencies and disparity between the CLEC's and Verizon's own long distance unit which is not the case of SWBT. No such finding has been purported to be the case in Texas by any parties. That investigation was not part of Verizon's entry into the long distance market in New York. The performance measures that are established in the order are not part of the Performance Assurance Plan, as WorldCom

would lead this Commission to believe. Instead, the order clearly avoids exerting any jurisdiction over Verizon's interstate access services.[7] This Commission would be well justified in coming to that same conclusion against exerting jurisdiction over interstate matters.

- ***WorldCom claims that SWBT is the dominant provider of access services in Texas and that as the dominant provider, its access tariffs lack any meaningful measurements or remedies.***

WorldCom complains that SWBT is the dominant access provider in Texas, but asks the Commission to impose requirements on SWBT to make its access service more attractive to its customers. As stated above, if WorldCom truly wanted competition, and not just a better deal for itself in the short term, it would be encouraging the Commission to loosen the restrictions it already places on SWBT so that the marketplace would encourage more competitive access providers. By making SWBT's access services more attractive to customers like WorldCom through punitive action by the Commission, other providers have a more difficult time in competing with SWBT.

Again, WorldCom asks the Commission here to alter SWBT's interstate and intrastate tariffs. As stated above, the Commission has no jurisdiction to do so for the interstate tariffs, and this proceeding is not a proper forum in which the intrastate tariffs can be modified.

SWBT is not agreeable to measuring its special access performance, both interstate and intrastate, within the framework of the Texas interconnection agreement.

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[7] Opinion and Order Modifying Special Services Guidelines for Verizon New York Inc., Conforming Tariff, and Requiring Additional Performance Reporting, Opinion No. 01-1, p. 16, fn. 23.

5. Conclusion

WHEREFORE, SWBT requests that the Commission's ruling in the Second Six Month review be set aside to the extent necessary so that PM 1.2 data is measured as SWBT has proposed and is currently measuring the data; that the penalty for PM 13 remain the same for the restated data; and that no Special Access levels of disaggregation be added to the UNE PMs, and for such other and further relief to which SWBT may be justly entitled.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Cynthia F. Malone, Senior Counsel, for Southwestern Bell Telephone Company, certify that a copy of this document was served on all parties of record in this proceeding on the 13th day of July, 2001 in the following manner:

By hand delivery, facsimile, electronic mail and/or by U.S. Mail.

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SWB
July 2, 2001

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PROJECT NO. 20400

SECTION 271 COMPLIANCE MONITORING OF SOUTHWESTERN BELL TELEPHONE COMPANY	**§ § § §**	**PUBLIC UTILITY COMMISSION OF TEXAS**

SOUTHWESTERN BELL TELEPHONE COMPANY'S MOTION FOR REHEARING AND CLARIFICATION

Southwestern Bell Telephone Company (SWBT) files this Motion for Rehearing and Clarification of the Order issued on June 1, 2001, relating to the second collaborative Six Month Review process for Performance Measurements (PMs).

I. BACKGROUND

Project No. 20400 generally, and the Performance Measurements Six Month Review process specifically, is the product of exhaustive negotiations, tests, agreements and orders of the Commission that preceded its conclusion that SWBT complied with Section 271 of the federal Telecommunications Act of 1996 (FTA). The Commission and the parties to that process negotiated the Texas 271 Agreement (T2A), an interconnection agreement setting forth the terms by which any competitive local exchange carrier (CLEC) could provide local exchange service in Texas within SWBT's certificated territory. The entire T2A represents a series of "gives and takes" by all parties participating in the 271 Collaborative Process, culminating in part with a series of obligations imposed on SWBT together with limitations on the extent of those obligations.

SWBT's Performance Remedy Plan (which is Attachment 17 to the T2A) establishes the process known as the Six Month Review for Performance Measurements. As recognized by Section 6.5 of Attachment 17, as well as by the

Commission in the Open Meeting on December 13, 2000, prior to the most recent review, one of the goals of the Six Month Review is to reduce the number of PMs.[1] The Performance Remedy Plan does, however, recognize that changes to existing measurements may occur and that new measurements may be added. The plan specifically sets forth how such changes can occur or additional measurements can be added. On this, the T2A is very clear:

> Any changes to existing performance measures and this remedy plan shall be by mutual agreement of the parties and, if necessary, with respect to new measures and their appropriate classification, by arbitration.[2]

SWBT is committed to the Six Month Review Process as it has developed and as it was defined in the T2A and believes that the collaborative tone and substance are effective, appropriate, and productive. The first Six Month Review and its "gives and takes" lead to results and PMs to which SWBT ultimately agreed, as they were interpreted at the time. This most recent review, however has resulted in a few changes to the PMs which are regrettably unacceptable to SWBT. These changes, in SWBT's opinion, provide no benefit to CLECs or to the public, and will only lead to disputes as to their application in the future. SWBT's specific concerns include:

- As explained in greater detail below, SWBT opposes being required to implement new measurements that would assess to its performance under the interstate and intrastate tariffs for the provisioning of retail Special Access services. Special Access services are provided only as a consequence of and in accordance with tariffs; they are not part of the T2A and thus cannot legally be subject to the Performance Remedy Plan.
- The implementation of PM 1.2 as defined in this second Six Month Review is unacceptable because it cannot implemented as directed. SWBT had offered its interpretation of how to report data for PM 1.2, and that is the only way that SWBT is aware that the intent of PM 1.2 can be accomplished.

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[1] *See* the discussion of the Commission, Open Meeting, December 13, 2000, pp. 87-91.

[2] Attachment 17: Performance Remedy Plan – TX, Section 6.4 (emphasis added).

- Finally, the order regarding PM 13 is confusing as to whether it requires punitive penalties, for which there is no basis. SWBT requests clarification as to the intent of the Commission with regard to PM 13.

As a result, SWBT respectfully requests the Commission to reconsider and clarify its order relative to each of these three matters in light of SWBT's arguments below. Absent modifications on rehearing, SWBT will not be able to mutually agree to these PMs or their implementation.[3] According to the criteria set forth in Section 6.4 of Attachment 17, SWBT will seek to resolve any disputes concerning any potential Special Access measures and PMs 1.2 and 13 through the remedies set forth in the T2A.

II. REQUEST FOR RECONSIDERATION

A. THERE IS NO BASIS UNDER THE T2A'S PERFORMANCE REMEDY PLAN TO ORDER THE IMPLEMENTATION OF SPECIAL ACCESS PMs.

In its June 1, 2001, Order, the Commission stated that "to the extent that a CLEC orders special access in lieu of UNEs, SWBT's performance shall be measured as another level of disaggregation in all UNE measures."[4] At the Open Meeting on May 24, 2001, there was discussion regarding whether Special Access performance measures were necessary. Former Chairman Wood concluded the discussion with a direction to Staff to "see if there's really a disagreement"[5] about whether the CLECs must order certain services as UNEs or whether they must use the Special Access Tariffs.

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[3] In any event, the Performance Remedy Plan is a form of liquidated damages to which both parties must voluntarily agree in order for the remedy to be lawful and binding, as was done in the T2A. SWBT does not agree to liquidated damages for these identified PMs and any attempt to compel a negotiated agreement would constitute a violation of SWBT's constitutional right to due process.

[4] Order No. 33, June 1, 2001, p. 88.

[5] Open Meeting Transcript, Thursday, May 24, 2001, p. 28. The discussion regarding Special Access is contained within pp. 19-28. A review of that transcript demonstrates a significant amount of uncertainty.

In preparing for the workshop to address this issue, SWBT investigated whether CLECs have been forced to order out of either the interstate or intrastate tariffs regarding Special Access, and SWBT has been unable to locate a single instance wherein a CLEC was forced to order out of the Special Access Tariffs. Further, the CLECs have brought forth no specific evidence. They merely make generalized allegations, which are not supported by any specific facts. Under these circumstances there is no record that would support instituting any special access measurements, and thus SWBT cannot agree to do so. In the workshop held just last Friday, June 29, 2001, SWBT asked for specific examples and none were provided by the CLECs. Furthermore, in the workshop last Friday, it appeared that this issue had gone well beyond the very limited instruction of the Commission on the application of Special Access. SWBT is now required to comment on WorldCom's far more global proposal.[6] We believe the Commissioners rejected such a global approach at the Open Meeting of May 24, 2001.

SWBT and other carriers have provided Special Access services for over twenty years, since divestiture. Competition in the special access arena is alive and well, and the service is classified as non-basic under Public Utility Regulatory Act (PURA) in recognition of options which customers have for Special Access. Indeed, a wealth of providers has resulted in a keenly robust and competitive market. Because multiple sources for these services exist, there is no need to establish measurements assessing SWBT's performance in providing such mature services, particularly not the kind of

[6] Since the workshop on Special Access took place this past Friday, June 29, 2001, SWBT may supplement this motion after review of the transcript.

measurements which have been previously developed for the provision of wholesale UNEs (e.g., DS1 loops) utilized to provide local exchange service.

Given this circumstance, there also is no reason for the Commission to exceed its limited jurisdiction with respect to these retail Special Access services. Research discloses that approximately 94% of Special Access services in Texas are ordered from the interstate tariff (FCC Tariff 73) over which the FCC has jurisdiction. Moreover, even with respect to SWBT's intrastate Special Access Tariff, the tariff terms and conditions alone control the provision of access and this Commission cannot unilaterally change those tariff terms and conditions. Further, those tariffs contain their own performance penalties in the tariff or by contract with SWBT. Such potential double recovery is prohibited by the Performance Remedy Plan itself, which says that it is the exclusive contract remedy. Significantly, the Remedy Plan measures SWBT's performance under the T2A. The T2A does not include the provision of Special Access services. Accordingly, there is no permissible way to unilaterally extend the coverage of the interconnection agreements to services which are clearly interstate services.

It is of no consequence that some carriers may make a business decision to utilize retail special access services for providing local exchange service, instead of wholesale UNEs. The purpose of this Commission having originally established PMs in this docket was to ensure SWBT's FTA Section 271 compliance with the 14-point checklist after SBC Communications Inc. became authorized to provide long distance service in Texas. The checklist does not address retail Special Access services, and FCC has three times concluded that performance relative to provisioning of Special

Access services is not relevant to checklist compliance.[7] Consequently, there is no foundation for directing SWBT to institute any such measures for this additional reason.

SWBT is not agreeable to measuring its Special Access performance, either interstate and intrastate, within the framework of the T2A.

B. PM 1.2 CANNOT BE IMPLEMENTED AS DIRECTED.

PM 1.2 was proposed to compare loop makeup information[8] provided to any CLEC, including ASI, with loop makeup information contained in SWBT's engineering confirmation/design layout records (DLR). When a CLEC orders loop makeup information, SWBT retrieves that information from its loop assignment system for the assembled plant facilities capable of serving the location. Then, a CLEC may or may not order a loop. If the CLEC waits any significant amount of time, that loop information may change or it may not be the same for the loop, which is actually provisioned for the CLEC. PM 1.2 does not in any way accomplish the intended purpose, the measurement of the accuracy of SWBT's loop make-up information. As described in detail below, SWBT cannot agree to implement PM 1.2, as recently interpreted, for the following reasons:

- The network is dynamic and therefore "accuracy" cannot be reliably measured;

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[7] Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) And Verizon Global Networks Inc., For Authorization to Provide In-Region, InterLATA Services in Massachusetts, CC Docket No. 01-9, Memorandum Opinion and Order, FCC 01-130, released April 16, 2001, n. 489 ("As we held in the *SWBT Texas* and *Bell Atlantic New York Orders*, we do not consider the provision of Special Access services pursuant to tariffs for purposes of determining checklist compliance. *SWBT Texas Order*, 15 FCC Rcd at 18504, para. 335; *Bell Atlantic New York Order*, 15 FCC Rcd at 4126-27, para. 340.")

[8] Loop make-up information is used by carriers to assist them in determining whether the loop facilities capable of serving a particular customer location might be suitable for use in the provision of advanced services, which are sensitive to characteristics of the loop plant. The information may include: loop length, length by segment, length by gauge, 26 gauge equivalent (calculated), presence of load coils, quantity of load coils (if applicable), presence of bridged tap, length of bridged tap (if applicable), presence of pair gain/Digital Loop Carrier equipment, and source of data (actual or designed).

- PM 1.2 creates a "Catch 22" discouraging SWBT from improving the network or its records;
- The recommendation to implement a "sampling" technique to measure "false positive" returns is unworkable and could place enormous new and unrecoverable costs on SWBT; and,
- SWBT should not have to, and is not legally required to, provide superior quality information to the CLECs than it does for itself.

1. The network is dynamic and therefore "accuracy" cannot be reliably measured.

The Business Rules[9] were established to measure parity when possible, or to set a benchmark when there is no retail analog to the wholesale item being measured. Staff's recommendation and the Commission's Order on the interpretation of PM 1.2 goes beyond the scope of the Business Rules themselves, and it requires action that can never be achieved by the requirements of this measurement. This measure simply reports whether SWBT's loop facility assignment system (LFACS) assigns the exact same facilities for which loop qualification results were forwarded to the CLEC. This will not and simply cannot occur if the CLEC has requested conditioning or if SWBT has performed a line and station transfer (LST) on the CLECs' behalf, situations that often occur. Thus, the measurement, as interpreted, cannot be met.

Because the network is constantly changing, loop makeup information is merely a "snap-shot" of the loop plant that exists as of the date and time that the information is retrieved. In many instances, new services are installed and other services are disconnected between the time that the loop qualification request is issued and when the loop is actually provisioned. As a result of these and other factors, the loop that is actually assigned some days or weeks later could be different than what was indicated

[9] The Business Rules describe the implementation of the specific PMs.

when loop makeup information was returned. The more time that separates a loop qualification request from provisioning, the less likely it is that the facility used will be the same. SWBT cannot reserve pairs for every loop qualification performed because the CLECs often do not issue an order for any loop, even if that loop is acceptable for the deployment of advanced services. Thus, PM 1.2 is measuring the accuracy of information which may never be used and for which no method exists to measure the accuracy of the information provided.

2. PM 1.2 creates a "Catch 22" discouraging SWBT from improving the network or its records.

Given that loop makeup information and DLR information are retrieved from the same databases, comparing the two does not serve any meaningful purpose, but that is what PM 1.2 would require. At the time a loop makeup request is processed, the DLR and the loop makeup information for the same loop, by definition, are essentially the same. Proposed PM 1.2, however, penalizes SWBT for updates to its DLR information and its loop makeup information, which occur after a loop makeup request has been processed. Further, it will also penalize SWBT for any updates in assignment of the loop and any work done in the network, including conditioning and line and station transfers. It thus creates the incentive for SWBT to cease maintaining, correcting, and updating its network records in order to avoid any future discrepancy between loop makeup and DLR information, and the accompanying imposition of penalty payments. Therefore, PM 1.2 creates the opposite incentives than those that SWBT believes the Commission intended.

PM 1.2, as presently written, places SWBT in a "Catch 22" position. Updating the records and correcting existing data errors will impose penalty payments upon

SWBT. Stop updating the records and correcting the existing data errors and business becomes unmanageable for both SWBT and the CLECs. SWBT does not believe that any performance measurement for actual loop makeup information is necessary, because plant design and database records are maintained at parity levels for both SWBT and the CLECs. PM 1.2, as is now being interpreted, simply does not accomplish what the data CLECs were attempting.

3. The recommendation to implement a "sampling" technique to measure "false" returns is unworkable, and could place enormous new and unrecoverable costs on SWBT.

Performing a statistically valid sample to validate those responses that were returned would be expensive, time consuming and take away from other critical service initiatives that are very important. Performing manual tests, physical plant inspections and other time consuming evaluations of engineering records are the only methods available for conducting such a sampling. It also must be considered that if the sample revealed a level of "accuracy" that was not acceptable (which it is likely to do considering how high the benchmark has been set), there is no means to increase the "accuracy" of the records in the databases (primarily LFACS) without spending an inordinate amount of resources. Further, the costs to perform sampling are estimated to be in the millions annually, and to test the entire network for accuracy and update the records would exceed a billion dollars over a multi-year period.

Imposing a sampling methodology would also force SWBT to remove data from its database when there is suspicion that the data is not accurate. This would increase the return of theoretical "worst case" data in more instances. For example, if it were determined that a particular geographic area was problematic, SWBT would not have the resources to measure all of the loops in that area and would instead remove the

problematic area of the plant from records. This would remove both "accurate" indications as well as "inaccurate" ones. Moreover, this sampling methodology and any associated broad testing of the network is only valid as long as the facility remains assembled. As soon as the components in the network "churn," that data must be removed as tested data only applies to that physical loop for the duration it remains in that configuration. Testing does not serve to address the accuracy of the component parts of the network and is never a permanent solution.

Should CLECs desire actual field confirmations of loop makeup information, let alone the supplementation of field information, SWBT will be compelled to pursue the recovery of the additional costs. Not surprisingly, the CLECs have not even suggested that they would be required to bear any portion of these costs. In any event, the benefits gained from SWBT's development of real-time electronic access to loop makeup information would be eviscerated if SWBT were required to manually recheck its plant, as suggested through the use of this unprecedented "sampling" technique.

4. SWBT is not required to provide CLECs loop make-up information that is superior in quality to that available to itself.

Even if this PM was modified to attempt to accomplish what the CLECs desired, the measure of accuracy of the loop makeup information, SWBT should only be required to supply the information it has, not to create superior information. SWBT's DLR records show the general location and condition of the plant, i.e., the cables, switches, and equipment in the field. These records have been developed over a long period of time in the provision of voice services, and are used by SWBT personnel in daily operations. The loop makeup information made available to affiliate and non-

affiliate CLECs is derived from this same source, thus ensuring nondiscriminatory access to the records by all network users.

Penalizing SWBT for not providing loop qualification information which matches perfectly with the actual state of SWBT's plant would require SWBT to provide the CLECs with more accurate loop makeup information than SWBT provides itself. This requirement directly contradicts the Eighth Circuit ruling in *Iowa Utilities Board II et al., v. FCC*, 219 F.3d 744 (8th Cir. 2000, *cert. granted*).[10] In that decision, the Eighth Circuit reiterated its earlier holding that incumbent carriers need not provide CLECs access to superior services:

> We again conclude the superior quality rules violate the plain language of the Act. . . . Subsection 251(c)(2)(C) requires the ILECs to provide interconnection "that is at least equal in quality to that provided by the local exchange carrier to itself. . . ." Nothing in the statute requires the ILECs to provide superior quality interconnection to its competitors. The phrase "at least equal in quality" establishes a minimum level for the quality of interconnection; it does not require anything more. We maintain our view that the superior quality rules cannot stand in light of the plain language of the Act. . . . We also note that it is self-evident that the Act prevents an ILEC from discriminating between itself and a requesting competitor with respect to the quality of the interconnection provided.

[10] First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, modified on recon., 11 FCC Rcd 13042 (1996), vacated in part, Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999), decision on remand, Iowa Utils. Bd. v. FCC, 219 F.3d 744 (8th Cir. 2000) "*Iowa Utilities Board II*"), petitions for cert. granted sub nom. Verizon Communications Inc. v. FCC, 121 S. Ct. 877 (2001).

Id. at 758. As this extended discussion makes evident, the ILECs' legal obligations are defined by parity. The FCC has repeatedly recognized the same in its Section 271 proceedings, requiring incumbent carriers to provide non-discriminatory access, not perfection.[11]

Moreover, the FCC addressed this issue most directly in the *UNE Remand Order*, stating: "an incumbent LEC must provide the requesting carrier with nondiscriminatory access to the same detailed information about the loop that is available to the incumbent. . . ."[12] Further, the FCC found that incumbent LECs are not required to:

> catalogue, inventory and make available to competitors loop qualification [loop-make-up] information through automated OSS even when it has no such information available to itself. If an incumbent LEC has not compiled such information for itself, we do not require the incumbent to conduct a plant inventory and construct a database on behalf of requesting carriers.[13]

As such, SWBT is only required to provide CLECs with the same information that is in its databases – and SWBT should not be penalized for inaccuracies in this information.

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[11] *See* Application by SBC Communications Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service, ¶ 44, CC Docket No. 00-65 (June 30, 2000) ("[W]here a retail analogue exists, a BOC must provide access that is equal to (i.e., substantially the same as) the level of access that the BOC provides itself, its customers, or its affiliates, in terms of quality, accuracy, and timeliness."); Bell Atlantic New York Order, 15 FCC Rcd at 3971, ¶ 44; Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, CC Docket No. 97-137, 12 FCC Rcd 20543, 20618-19.

[12] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Third Report And Order And Fourth Further Notice Of Proposed Rulemaking,* CC Docket No. 96-98 (rel. Nov. 5, 1999) ("*UNE Remand Order*"), ¶ 427. (Emphasis added).

[13] *Id.* at ¶ 429.

C. THE RESTATEMENT OF PM 13 DATA SHOULD NOT SUBJECT SWBT TO PUNITIVE PENALTIES.

The following provision in the June 1, 2001, Order regarding PM 13 is unclear in its intent:

> The Commission finds that, based on the discrepancy of corrected data that overstated its performance delivered to CLEC, SWBT shall pay liquidated damages. Such damages shall be set at high level on a per occurrence basis without a measurement cap to individual CLECs. In addition SWBT shall also pay Tier – 2 penalties based on the corrected data on a per occurrence basis.[14]

The level for Tier-1 penalties for PM 13 was previously set at the low level. SWBT has paid penalties to the individual CLECs on this basis. Information which was developed at the second Six Month Review lead Staff and SWBT to the understanding that SWBT had not been capturing and reporting the data as the Commission had originally intended, despite the fact that SWBT understood it was fully complying with this new PM. Therefore, SWBT has agreed to restate the data for PM 13 and to submit to an audit of its processes and data calculation. The above provision however, appears to order that the penalty level for Tier-1 be changed for the recalculation of that data from the low level to the high level. Retroactively increasing the level is tantamount to implementing a punitive penalty. There is no basis under the Performance Remedy Plan or the law to retroactively increase the level of payments. To make it clear, SWBT is willing to retroactively make any necessary payments that results from the restatement or audit described above — these payments however should be at the level established for this PM when it was developed, the low level. SWBT cannot agree that the Tier – 1 damage level should be changed retroactively

[14] Order No. 33, June 1, 2001, p. 78.

without a measurement cap. This cannot be the intent of the Commission. SWBT seeks further clarification as to the meaning of the Commission's order in this regard.

WHEREFORE, SWBT requests that the Commission's ruling in the Second Six Month review with regard to PM 1.2 be set aside, that the ruling on PM 13 be clarified, and that no Special Access levels of disaggregation be added to the UNE PMs, and for such other and further relief to which SWBT may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Cynthia F. Malone, Senior Counsel, for Southwestern Bell Telephone Company, certify that a copy of this document was served on all parties of record in this proceeding on the 2nd day of July, 2001 in the following manner: By hand delivery, facsimile and/or by U.S. Mail.

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May 22, 2001

Honorable Michael K. Powell, Chairman
Federal Communications Commission
445 Twelfth Street; S W.
Washington, D.C. 20554

RE: Special Services Performance By Verizon-New York, Inc.

Dear Chairman Powell:

I am writing to ask your assistance regarding Verizon's special services performance On November 24, 2000, the New York Public Service Commission initiated a proceeding to investigate ways to improve the service quality performance of Verizon for special services because of long delays in provisioning such services. We have determined, based on the record in the proceeding, that Verizon remains the dominant provider of facilities for special services, that Verizon's provisioning performance for special services is significantly below our service quality standards, and that Verizon may be treating other carriers less favorably than its end users.

At its May meeting, the Commission adopted a rebate plan for Verizon's intrastate special service circuits. We will continue to monitor and refine our reporting standards, but our ability to encourage Verizon is dependent on the Federal Communications Commission's scrutiny regarding interstate circuits.

Our agency would be willing to establish and enforce service standards on all special services, if this were a matter your agency believed should reasonably be delegated to New York State I look forward to working with you on this important matter crucial to facilities-based competition in New York.

Sincerely,

Maureen O. Helmer

MAUREEN O. HELMER

cc: David Solomon
Dorothy Attwood
Suzanne Tetreault